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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 CHARLES SMEDLEY, III, ) Case No. 08cv1602-BTM (BLM)  
12 )  
13 Plaintiff, ) **REPORT AND RECOMMENDATION FOR**  
14 v. ) **ORDER GRANTING DEFENDANTS'**  
15 G. REID, et al., ) **MOTION TO DISMISS**  
16 ) **[Doc. No. 11]**  
17 Defendants. )  
18 \_\_\_\_\_ )

16 This Report and Recommendation is submitted to United States  
17 District Judge Barry Ted Moskowitz pursuant to 28 U.S.C. § 636(b) and  
18 Civil Local Rules 72.1(c) and 72.3(f) of the United States District  
19 Court for the Southern District of California. On August 29, 2008,  
20 Plaintiff Charles Smedley, III, proceeding *pro se* and *in forma pauperis*,  
21 filed this civil rights suit under 42 U.S.C. § 1983. Doc. No. 1  
22 ("Compl."). On April 7, 2009, Defendants filed a motion to dismiss  
23 Plaintiff's Complaint. Doc. No. 11. Plaintiff did not file an  
24 opposition to Defendants' motion. The Court set a hearing date of May  
25 25, 2009, and took the matter under submission. After considering the  
26 Complaint and Defendants' Motion to Dismiss, and for the reasons stated  
27 below, this Court **RECOMMENDS** that Defendants' Motion to Dismiss be  
28 **GRANTED** as follows.

**BACKGROUND**

Plaintiff's claims arise from actions allegedly committed by Correctional Officer G. Reid and Medical Technical Assistant Williams<sup>1</sup> while Plaintiff was an inmate at R.J. Donovan State Prison. Compl. According to the Complaint, Plaintiff and Defendant Reid were conversing on December 22, 2006 when, without warning, Defendant Reid closed a cell door on Plaintiff's head, causing Plaintiff significant pain. Id. Despite Plaintiff's protestations and those of another correctional officer, Defendant Reid refused to open the door, and Plaintiff's head remained stuck until another inmate freed him. Id.

Later that evening, Plaintiff was taken to the prison medical center, where Medical Technical Assistant Williams examined Plaintiff's head. Id. at 4. When Plaintiff explained that a correctional officer closed a door on his head, Defendant Williams allegedly stated he did not believe Plaintiff. Further, although Defendant Williams felt swelling around Plaintiff's head and jaw, Defendant Williams did not note this, and instead filed a "false" medical report that merely described Plaintiff as being in pain. Id.

Plaintiff alleges the above actions rise to the level of constitutional violations. Specifically, Plaintiff argues Defendants' conduct constitutes a denial of "adequate medical care" and "freedom from cruel and unusual punishment," in violation of the Eighth and Fourteenth Amendments of the U.S. Constitution.<sup>2</sup> Id. at 3-4.

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<sup>1</sup>Plaintiff does not supply Defendants' first names.

<sup>2</sup>Plaintiff fails to specify which Defendant committed which violations. Compl. at 3-4. Because Defendant Reid allegedly committed the door-closing act, but was not involved in providing medical care, and because Defendant Williams provided allegedly deficient medical care, but was not implicated in the door closing, the Court interprets Plaintiff's Complaint as ascribing "cruel and unusual punishment" to

1 After the events described above, Plaintiff was transferred to  
2 Pleasant Valley State Prison in February 2007 and housed there until he  
3 was paroled on April 27, 2007. Declaration of E. Franklin at 3;  
4 Declaration of C. Huckaby at 3. Plaintiff subsequently was re-  
5 incarcerated at R.J. Donovan, and filed the instant Complaint. Compl.  
6 at 1 (cover page showing Complaint filed from R.J. Donovan). Plaintiff  
7 apparently was released again in November 2008. Doc. No. 6.

8 Plaintiff seeks \$200,000 in damages for Defendants' alleged  
9 wrongdoing. Id. at 7. He does not seek injunctive relief. Id.  
10 Plaintiff does not specify whether he is suing Defendants in their  
11 individual or official capacities, nor does he specify in what manner  
12 Defendants may have acted under the color of law. Id. at 2.

#### 13 DISCUSSION

14 Defendants argue that Plaintiff's claims should be dismissed for  
15 the following reasons: (1) Plaintiff failed to exhaust his  
16 administrative remedies, (2) Plaintiff fails to state a claim under  
17 Federal Rule of Civil Procedure (Rule) 12(b)(6), (3) Plaintiff's  
18 Fourteenth Amendment claim is improper, as the allegations must be  
19 presented under the Eighth Amendment, (4) insofar as Plaintiff sues  
20 Defendants in their official capacities, the Eleventh Amendment  
21 immunizes them from liability, and (5) insofar as Plaintiff sues  
22 Defendants in their individual capacities, they are protected by  
23 qualified immunity. Doc. No. 11-1 ("Def. Mem.").

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27 Defendant Reid, and denial of "adequate medical care" to Defendant Williams. See  
28 Erickson v. Pardus, 551 U.S. 89, 94 (2007); Thompson v. Davis, 295 F.3d 890, 895 (9th  
Cir. 2002) (requiring court to liberally construe *pro se* plaintiff's complaint).

1 **A. Failure to Exhaust Administrative Remedies.**

2 Defendants contend that Plaintiff failed to exhaust his  
 3 administrative remedies before filing the instant action, and that  
 4 Plaintiff's Complaint therefore must be dismissed. Def. Mem. at 4-7.  
 5 Although provided an opportunity to do so, Plaintiff did not file a  
 6 reply to Defendant's Motion to Dismiss, and therefore did not directly  
 7 address this argument. Doc. No. 12 (order noting that Plaintiff had not  
 8 yet responded to Defendant's motion to dismiss, as provided for by CivLR  
 9 7.1(d)(1)).<sup>3</sup> However, in the Complaint, Plaintiff states that he  
 10 "complied with mandates of PLRA with respect of attempting to exhaust  
 11 available admistrated [sic] remedies. However, Plaintiff was  
 12 transferred to 'Pleasant Valley' state prison. Plaintiff sought to  
 13 track appeals and also wrote to director of corrections in making a good  
 14 faith effort to comply to no avail." Compl. at 6.

15 The Prison Litigation Reform Act ("PLRA") provides that "[n]o  
 16 action shall be brought with respect to prison conditions under section  
 17 1983 of this title, or any other Federal law, by a prisoner confined in  
 18 any jail, prison, or other correctional facility until such  
 19 administrative remedies as are available are exhausted." 42 U.S.C.  
 20 § 1997e(a). The exhaustion requirement is a mandatory prerequisite to  
 21 suit. See Porter v. Nussle, 534 U.S. 516, 524 (2002) ("[e]ven when the  
 22 prisoner seeks relief not available in grievance proceedings, notably  
 23 money damages, exhaustion is a prerequisite to suit"); Booth v. Churner,  
 24 532 U.S. 731, 739 (2001). The PLRA requires "proper exhaustion," i.e.,

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 27 <sup>3</sup>Plaintiff failed to file an opposition to Defendants' motion to dismiss. It  
 28 therefore is within the Court's discretion to grant Defendants' motion as unopposed  
 under Local Rule 7.1(f)(3)(c) of the Southern District of California. Nonetheless, the  
 Court reviews motion on its merits.

1 compliance with the state's "critical procedural rules" governing its  
2 administrative grievance or appeals procedure. See Woodford v. Ngo, 548  
3 U.S. 81, 93-95 (2006). All available steps in the administrative  
4 process must be completed before a civil rights action is filed, and  
5 exhaustion during the pendency of the litigation will not save a claim  
6 or an action from dismissal. See McKinney v. Carey, 311 F.3d 1198, 1200  
7 (9th Cir. 2002).

8 The PLRA does not impose a pleading requirement. Rather, failure  
9 to exhaust is an affirmative defense that defendants have the burden of  
10 raising and proving. See Jones v. Bock, 549 U.S. 199, 215-18 (2007);  
11 Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). The failure to  
12 exhaust administrative remedies "is subject to an unenumerated Rule  
13 12(b) motion rather than a motion for summary judgment." Wyatt, 315  
14 F.3d at 1119 (citing Ritza v. Int'l Longshoremen's & Warehousemen's  
15 Union, 837 F.2d 365, 368 (9th Cir. 1988)). When deciding a motion to  
16 dismiss for failure to exhaust administrative remedies, the court may  
17 look beyond the pleadings and decide disputed issues of fact, but it  
18 must assure that the plaintiff has fair notice of his opportunity to  
19 develop the record. Wyatt, 315 F.3d at 1119-20 n.14. If the court  
20 concludes that the prisoner has failed to exhaust all available  
21 administrative remedies, the proper remedy is dismissal without  
22 prejudice. Id.

23 The California Department of Corrections and Rehabilitation  
24 ("CDCR") utilizes a four-step grievance process for prisoners seeking  
25 review of an administrative decision or perceived mistreatment. Vaden  
26 v. Summerhill, 449 F.3d 1047, 1048-49 (9th Cir. 2006); Cal. Code Regs.  
27 tit. 15, §§ 3084.1-3084.6. In most cases, the first step in the process  
28 requires the inmate to informally attempt to resolve his grievance with

1 the prison staff member. Cal. Code Regs. tit. 15, § 3084.5(a); id. at  
2 § 3084.5(a)(3)(G) (waiving informal resolution requirement for cases  
3 involving "[a]lleged misconduct by a departmental peace officer"). If  
4 unsuccessful, the inmate can complete an inmate appeal "602" form. Id.  
5 § 3084.5(b). If denied at that level, the inmate can appeal to the  
6 second level of review conducted by the institution head or his  
7 designee. Id. § 3084.5(c). The third and final level of review, the  
8 Director's level, is conducted by the CDCR's Director or her designee.  
9 Id. § 3084.5(d).

10 1. Whether Plaintiff Was Required to Exhaust his Administrative  
11 Remedies.

12 As an initial matter, the Court must decide whether, under the  
13 unusual circumstances of this case, the exhaustion requirement applies.  
14 Although the exhaustion requirement pertains to plaintiffs who file  
15 their complaints while in custody, plaintiffs who file complaints after  
16 being released are not required to exhaust administrative remedies, even  
17 when the suit concerns events that occurred while the plaintiff was  
18 incarcerated. Talamantes v. Leyva, 575 F.3d 1021, 1023-24 (9th Cir.  
19 2009). Here, the events underlying Plaintiff's complaint occurred while  
20 he was in custody, and he partly exhausted his administrative remedies  
21 at that time. Declaration of N. Grannis at 3; Decl. Franklin at 3  
22 (describing Plaintiff's partial progress through the administrative  
23 appeals process); see also infra at 8-11 (discussing Plaintiff's  
24 incomplete exhaustion of remedies). Plaintiff was released from custody  
25 in April 2007. Decl. Franklin at 3; Compl. at 1. The record does not  
26 reflect when Plaintiff returned to prison, but it is clear that in  
27 August 2008, he was back in custody because he listed an R.J. Donovan  
28 address when he filed his Complaint. Compl. at 1. In November 2008,

1 Plaintiff again was released from custody. Doc. No. 6. Absent any  
2 evidence to the contrary, and in light of Plaintiff's duty to notify the  
3 Court of address changes, the Court assumes that Plaintiff has not  
4 returned to custody. The question therefore is whether a plaintiff who  
5 failed to exhaust his administrative remedies while in prison, or to  
6 file a complaint upon his release, still is subject to the exhaustion  
7 requirement when he files a complaint upon re-incarceration, and  
8 subsequently is re-released. Neither party raises or discusses this  
9 issue.

10 The PLRA states that "[n]o action shall be brought with respect to  
11 prison conditions under [42 U.S.C. § 1983], or any other Federal law, by  
12 a prisoner confined in any jail, prison, or other correctional facility  
13 until such administrative remedies as are available are exhausted." 42  
14 U.S.C. § 1997e(a) (emphasis added). When construing this provision of  
15 the PLRA, the Ninth Circuit recently emphasized a court's duty to adhere  
16 to the plain language of the statute: "It is well settled that, in a  
17 statutory construction case, analysis must begin with the language of  
18 the statute itself; when the statute is clear, 'judicial inquiry into  
19 [its] meaning, in all but the most extraordinary circumstance, is  
20 finished.'" Talamantes, 575 F.3d at 1023 (quoting United States v.  
21 Carter, 421 F.3d 909, 911 (9th Cir. 2005)). Although Plaintiff later  
22 was released, he was a prisoner at the time he filed the Complaint, and,  
23 under the plain language of the statute, therefore was required to have  
24 exhausted all available administrative remedies.<sup>4</sup> 42 U.S.C. § 1997e(a);

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26 <sup>4</sup>Plaintiff does not allege that his release from prison prevented him from  
27 exhausting his administrative remedies, and the Court therefore need not address this  
28 question. In fact, after his April 27, 2007 parole (Decl. Franklin at 3), Plaintiff  
continued with the administrative appellate process, albeit improperly. Decl. Grannis  
at 3 (stating that the final-level appellate division rejected a July 25, 2007 appeal

1 Page v. Torrey, 201 F.3d 1136, 1139-40 (9th Cir. 2000) (construing PLRA  
2 literally and holding that all prisoners are subject to the exhaustion  
3 requirement). The fact that the PLRA does not specifically address  
4 Plaintiff's situation does not alter the Court's interpretation of the  
5 statute. Talamantes, 575 F.3d at 1024 ("no mere statutory omission ...  
6 which it may seem wise to have specifically provided for, justifies any  
7 judicial addition to the language of the statute")(citing Jones v. Bock,  
8 549 U.S. 199, 216-217 (2007)). This reading of the statute also  
9 comports with the purposes of the PLRA: to "afford corrections officials  
10 time and opportunity to address complaints internally before allowing  
11 the initiation of a federal case," and to "reduce the quantity and  
12 improve the quality of prisoner suits." Woodford, 548 U.S. 81, 93-94  
13 (citations omitted); see also Jones, 549 U.S. at 223 (purpose of PLRA is  
14 to "reduce the quantity of inmate suits").

15 The Court therefore finds that the PLRA required Plaintiff to  
16 exhaust his administrative remedies prior to filing suit. So, the Court  
17 now turns to the issue of whether Plaintiff properly exhausted his  
18 administrative remedies.

19 2. Plaintiff Failed to Exhaust his Administrative Remedies.

20 In order to have properly exhausted his claims, Plaintiff was  
21 required to exhaust all available administrative remedies, either by  
22 presenting his claims to all three levels of formal administrative  
23 review, or by receiving a response at an earlier level of review that  
24 rendered further presentation futile. Brown v. Valoff, 422 F.3d 926,  
25 936 (9th Cir. 2005). Plaintiff filed two relevant appeals, one  
26 regarding each Defendant's alleged behavior, but failed to exhaust

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28 from Plaintiff, for failure to first file at the intermediate step).



1 either. Decl. Franklin at 3-4; id. Exs. A-C (copies of Plaintiff's  
2 administrative appeals and responses).

3 Plaintiff's first-level appeal against Defendant Reid requested "a  
4 verbal apology for the pain he caused me, and whatever disciplinary  
5 action that can be placed on him." Decl. Franklin Ex. A at 1. This  
6 appeal was "partially granted," in that an inquiry was conducted into  
7 Plaintiff's allegations. Id. at 3. Bypassing the second level of  
8 review, Plaintiff appealed the partial grant directly to the third  
9 level, where his appeal was denied for failing to complete the  
10 intermediate step. Decl. Grannis at 3 (describing third-level rejection  
11 of Plaintiff's complaint, log number RJD-07-00016); Decl. Franklin Ex.  
12 A at 3 (showing this log number describes complaint against Defendant  
13 Reid).

14 In some circumstances, a partial grant of a prisoner's first-level  
15 administrative appeal may without further presentation exhaust the  
16 prisoner's administrative remedies. Brown, 422 F.2d at 937-39. When  
17 judging whether a partial grant constitutes exhaustion, a court looks  
18 at, *inter alia*, the remedies requested by the prisoner. Id. at 939-40  
19 (administrative process need only consider remedies requested). If the  
20 partial grant fully addresses the requested remedies, and forecloses any  
21 further possibility of relief, then further administrative appeals would  
22 be futile, and the claims are exhausted. Id. at 936-40. If, on the  
23 other hand, remedies remain available or unaddressed, exhaustion  
24 requires the prisoner to pursue his claims through the administrative  
25 appeals process. Id. A prisoner is required to exhaust "regardless of  
26 the fit between [his] prayer for relief and the administrative remedies  
27 possible." Id. at 935 (citing Booth v. Churner, 532 U.S. 731, 739  
28 (2001)); Porter, 534 U.S. at 524 .

1 In his administrative appeal, Plaintiff requested an inquiry into  
2 Defendant Reid's conduct and an apology (Decl. Franklin Ex. A at 1), but  
3 only received a statement from the prison that an inquiry had been  
4 conducted into Plaintiff's allegations (id. at 3). Some requested  
5 relief, the apology, thus remained that may have been made available had  
6 Plaintiff exhausted the appeals process.<sup>5</sup> Brown, 422 F.2d at 939-40; id.  
7 at 945 (Reinhardt, J., concurring in part and dissenting in part)  
8 (citing apology as example of possible remedy for prisoner complaint).  
9 "The obligation to exhaust 'available' remedies persists as long as *some*  
10 remedy remains 'available.'" Id. at 935 (emphasis in original). Because  
11 Plaintiff failed to present his claim against Defendant Reid at all  
12 three levels of review, or to receive a decision that rendered further  
13 presentation futile, this claim therefore is unexhausted. See Tsehai v.  
14 Schwartz, 2006 WL 3050819, at \*3 (E.D. Cal. Oct. 25, 2006) (because  
15 plaintiff requested apology from correctional officer who allegedly used  
16 excessive force, and failed to receive apology or appeal request at all  
17 levels, excessive force claim was not exhausted); Johnson v. Gregoire,  
18 2008 WL 5156428, at \*10 (W.D. Wash. Dec. 9, 2008) (prisoner's  
19 administrative grievance form requested that prison employee have "more  
20 positive attitude toward prisoners," but plaintiff offered no proof that  
21 this occurred, and failed to pursue request at all levels of  
22 administrative appeal; plaintiff's administrative remedies therefore

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24 <sup>5</sup>Plaintiff also requested that Defendant Reid be disciplined by the prison.  
25 Decl. Franklin Ex. A at 1. The warden's statement that an inquiry had been conducted  
26 into Plaintiff's complaint, and that confidentiality prevented the prison from  
27 informing Plaintiff of the results of the inquiry exhausted this aspect of Plaintiff's  
28 request. Brown, 422 F.2d at 937-40 (under similar circumstances, request for  
discipline exhausted at second-level appeal because plaintiff would never know the  
results of investigation, and thus would not know whether to appeal). However, because  
the issue of the apology remained un-addressed, Plaintiff's claim against Defendant  
Reid is not exhausted. Brown, 422 F.2d at 936-40.

1 were not exhausted).

2 Plaintiff's claim against Defendant Williams also is unexhausted.  
 3 In his first-level appeal, Plaintiff requested that Defendant Williams  
 4 "write the facts as they happened and not be rude to me. I want his  
 5 background checked and if possible his resignation [sic]." Decl.  
 6 Franklin Ex. B at 1. In response, CDCR informed Plaintiff that his  
 7 request partially was granted<sup>6</sup>, but that "[i]f you feel you were wronged  
 8 by custody you will need to complete a citizens [sic] complaint on the  
 9 officer for the alleged assault you are reporting. Please complete a  
 10 CDC 7363 [form] so you can discuss your medical issues with a provider.  
 11 The 602 [form Plaintiff filed] is not the format for reporting or  
 12 requesting background checks or resignation." Id. at 3; Decl. Franklin  
 13 Ex. C. There is no evidence that Plaintiff filed the required CDC 7363  
 14 form, and Plaintiff did not appeal the first-level decision. Decl.  
 15 Franklin at 4; id. Ex. B at 3 & Ex. C. Plaintiff therefore failed to  
 16 exhaust his administrative remedies with regards to his claim against  
 17 Defendant Williams. Woodford, 548 U.S. at 93-95.

18 Further, Plaintiff essentially concedes that he failed to properly  
 19 exhaust his claims, stating that he "sought to track appeals ... in [  
 20 a good faith effort to comply, to no avail." Compl. at 6. And, insofar  
 21 as this statement is an argument that it was futile for him to proceed  
 22 further with the administrative appeals process, that argument fails:  
 23 courts "will not read futility or other exceptions into statutory  
 24 exhaustion requirements where Congress has provided otherwise." Booth

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 27 <sup>6</sup>Although the record does not specify in what way Plaintiff's request was  
 28 "partially granted," it may have been a CDCR employee's follow-up contact with  
 Plaintiff and communication with a lawyer. Decl. Franklin Ex. B at 3 (notes on form  
 responding to first-level appeal).

1 v. Churner, 532 U.S. 731, 741 n.6 (2001). Therefore, the Court  
 2 **RECOMMENDS** that both of Plaintiff's claims be **DISMISSED WITHOUT**  
 3 **PREJUDICE** for failure to exhaust. Wyatt, 315 F.3d at 1120 ("If the  
 4 district court concludes that the prisoner has not exhausted nonjudicial  
 5 remedies, the proper remedy is dismissal of the claim without  
 6 prejudice").

7 **B. Failure to State a Claim Under Rule 12(b)(6) of the Federal Rules**  
 8 **of Civil Procedure.**

9 Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants  
 10 seek dismissal of Plaintiff's complaint on the grounds that Plaintiff  
 11 fails to state a claim upon which relief can be granted. Def. Mem. at  
 12 7-10. A Rule 12(b)(6) motion tests the legal sufficiency of a  
 13 plaintiff's claims. Fed. R. Civ. P. 12(b)(6). Accordingly, the "focus  
 14 of any Rule 12(b)(6) dismissal . . . is the complaint." Schneider v.  
 15 California Dep't of Corrs., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).  
 16 When reviewing a Rule 12(b)(6) motion, the court may consider the facts  
 17 alleged in the complaint and documents properly attached to it. See Hal  
 18 Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19  
 19 (9th Cir. 1989). The court also may consider documents the plaintiff's  
 20 complaint necessarily relies on and "whose authenticity no party  
 21 questions, but which are not physically attached to the [plaintiff's]  
 22 pleading." Kniesel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005); Lee v.  
 23 City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). However, the  
 24 court "may not look beyond the complaint to a plaintiff's moving papers,  
 25 such as a memorandum in opposition to a defendant's motion to dismiss."  
 26 Schneider, 151 F.3d at 1197 n.1 (emphasis in original).

27 For purposes of a Rule 12(b)(6) motion, the court must accept as  
 28 true all material factual allegations in the complaint, as well as

1 reasonable inferences to be drawn from them, and must construe the  
2 complaint in the light most favorable to the plaintiff. See Cholla  
3 Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004). When a  
4 plaintiff appears *pro se*, the court must be careful to construe the  
5 pleadings liberally and to afford the plaintiff any benefit of the  
6 doubt. Erickson, 551 U.S. at 94; Thompson, 295 F.3d at 895. This rule  
7 of liberal construction is "particularly important" in civil rights  
8 cases. Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992).  
9 However, the court is not permitted to "supply essential elements of the  
10 claim that were not initially pled." Ivey v. Bd. of Regents of the  
11 Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). "Vague and  
12 conclusory allegations of official participation in civil rights  
13 violations are not sufficient to withstand a motion to dismiss." Id.

14 In 2007, the United States Supreme Court departed from the more-  
15 liberal pleading rule established in 1957 and held that a claim may be  
16 dismissed pursuant to Rule 12(b)(6) if the plaintiff fails to articulate  
17 "enough facts to state a claim to relief that is *plausible on its face*."  
18 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (emphasis  
19 added) (abrogating pleading standard established by Conley v. Gibson,  
20 355 U.S. 41, 78 (1957)). This new standard requires a plaintiff to  
21 plead a set of facts "plausibly suggesting (not merely consistent with)"  
22 the defendant's alleged violations. Twombly, 550 U.S. at 557; Moss v.  
23 U.S. Secret Service, 572 F.3d 962, 968 (9th Cir. 2009) (citing Twombly).  
24 However, in announcing this rule, the Court also indicated that  
25 pleadings are not necessarily deficient merely because "recovery is very  
26 remote and unlikely." Twombly, 550 U.S. at 556; Moss, 572 F.3d at 968;  
27 see also Erickson v. Pardus, 551 U.S. 89, 93 (2007) ("[s]pecific facts  
28 are not necessary" to satisfy pleading requirements of FRCP Rule

1 8(a)(2)).

2 Recently, the Supreme Court clarified the parameters of the new  
3 plausibility standard in evaluating the factual sufficiency of a civil  
4 rights complaint. Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937  
5 (2009). In Iqbal, the plaintiff alleged that in the aftermath of  
6 September 11, 2001, the United States Attorney General was the  
7 "principal architect" of a policy that subjected plaintiff and other  
8 Arab Muslims to "harsh conditions of confinement on account of his race,  
9 religion, or national origin" in violation of the U.S. Constitution, and  
10 that the Director of the FBI was "'instrumental' in adopting and  
11 executing" the policy. Id. at 1951. The Supreme Court determined that  
12 the complaint failed "to plead sufficient facts to state a claim for  
13 purposeful and unlawful discrimination against [the Attorney General and  
14 Director of the FBI]." Id. at 1954. In reaching this determination,  
15 the Court initially held that "bare assertions" which "amount to nothing  
16 more than a 'formulaic recitation of the elements' of a constitutional  
17 discrimination claim" are to be disregarded. Id. The Court explained  
18 that "[i]t is the conclusory nature of the ... allegations, rather than  
19 their extravagantly fanciful nature, that disentitles them to the  
20 presumption of truth." Id.

21 After disregarding the conclusory allegations, the Court examined  
22 the remaining facts. Id. at 1951-52. The Court accepted as true  
23 Plaintiff's factual allegations and found that they *could* establish a  
24 discriminatory intent on behalf of the two defendants. Id. at 1951.  
25 However, the Court continued that the asserted facts also could support  
26 a non-discriminatory scenario in which a legitimate policy had a  
27 "disparate, incidental impact on Arab Muslims." Id. The Court then  
28 compared the two possibilities and concluded that "[a]s between that

1 'obvious alternative explanation' for the arrests ... and the  
2 purposeful, invidious discrimination respondent asks [the Court] to  
3 infer, discrimination is not a plausible conclusion." Id. at 1951-52  
4 (citing Twombly, 550 U.S. at 567). The Court added that the complaint  
5 also was deficient because it did not "contain any factual allegation  
6 sufficient to plausibly suggest [Defendants'] discriminatory state of  
7 mind." Id. at 1952.

8 In July 2009, the Ninth Circuit applied the standard articulated in  
9 Twombly and Iqbal, again in the context of a civil rights claim against  
10 the government. Moss, 572 F.3d at 967-972. Moss concerned a group  
11 protesting against then-President George W. Bush, outside a restaurant  
12 in which he was eating. Id. 970-971. Citing safety concerns, the  
13 Secret Service and local police relocated the anti-President  
14 demonstrators but left a similarly-situated pro-President demonstration  
15 in place, as well as diners inside the restaurant. Id. The relocated  
16 protestors sued the Secret Service, alleging the agency pursued an  
17 unspoken policy of moving anti-President protestors only, in violation  
18 of the First Amendment's prohibition on viewpoint discrimination. Id.  
19 After discussing Twombly and Iqbal, The Ninth Circuit held that the  
20 plaintiffs failed to state a claim. In reaching this holding, the Ninth  
21 Circuit summarized the new pleading standard as follows:

22 "A claim has facial plausibility, the [Supreme] Court  
23 explained, 'when the plaintiff pleads factual content that  
24 allows the court to draw the reasonable inference that the  
25 defendant is liable for the misconduct alleged.' 129 S.Ct. at  
26 1949. 'The plausibility standard is not akin to a probability  
27 requirement, but it asks for more than a sheer possibility  
28 that a defendant has acted unlawfully.' Id. (quoting Twombly,  
550 U.S. at 556). 'Where a complaint pleads facts that are  
'merely consistent with' a defendant's liability, it stops  
short of the line between possibility and plausibility of  
entitlement to relief.' Id. (quoting Twombly 550 U.S. at  
557).

1 In sum, for a complaint to survive a motion to dismiss, the  
 2 non-conclusory 'factual content,' and reasonable inferences  
 3 from that content, must be plausibly suggestive of a claim  
 4 entitling the plaintiff to relief."

5 Moss, 572 F.3d at 969 (some internal citation and punctuation omitted).

6 Applying this standard to the claims before it, the Moss court held  
 7 that although the facts did not "rule out the possibility of viewpoint  
 8 discrimination, and thus at some level [] are consistent with a viable  
 9 First Amendment claim ... mere possibility is not enough" to survive a  
 10 motion to dismiss. Id. at 971-72; but see Al-Kidd v. Ashcroft, ---  
 11 F.3d ---, 2009 WL 2836448, at \*21-\*24 (9th Cir. Sept. 4, 2009) (civil  
 12 rights case distinguishing Iqbal and finding plaintiff pled sufficient  
 13 facts to articulate plausible claim). With this new standard in mind,  
 14 the Court assesses Plaintiff's claims.

15 1. Plaintiff's Eighth Amendment Claim of Cruel and Unusual  
 16 Punishment Against Defendant Reid.

17 Plaintiff alleges that as he and Defendant Reid were talking,  
 18 Defendant Reid, who was in sole control of Plaintiff's cell door,  
 19 intentionally and without warning closed Plaintiff's head in the door.  
 20 Compl. at 3. Plaintiff states that although his head remained trapped,  
 21 causing him to scream from "excruciating pain," and another correctional  
 22 officer to "scream[]" as well, Defendant Reid did not open the door.  
 23 Id. Ultimately, another inmate forced the door open to release  
 24 Plaintiff's head. Id. As a result of this incident, Plaintiff alleges  
 25 "irreparable harm, from constant pain to needing a mood stabilizer  
 26 especially for anxieties with authorities." Id.<sup>7</sup> Defendants argue that

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27 <sup>7</sup>These events are further elaborated upon in a declaration attached to  
 28 Defendants' memorandum in support of the motion to dismiss, and exhibits accompanying  
 the declaration. Decl. Franklin at 3-4; id. Exs. A & B (copies of Plaintiff's prison  
 complaints, specifying, *inter alia*, that Plaintiff originally stated that Defendant



1 because Plaintiff fails to provide enough detail regarding the incident,  
 2 the claim should be dismissed under Rule 12(b)(6). Def. Mem. at 8-9.  
 3 Specifically, Defendants contend that Plaintiff fails to show Defendant  
 4 Reid's use of force was malicious rather than a permissible good-faith  
 5 effort to maintain or restore discipline, or that the use of force was  
 6 not required by the circumstances. Id.

7 "[T]he unnecessary and wanton infliction of pain constitutes cruel  
 8 and unusual punishment forbidden by the Eighth Amendment." Hudson v.  
 9 McMillian, 503 U.S. 1, 5 (1992) (internal punctuation omitted) (citing  
 10 Whitley v. Albers, 475 U.S. 312, 319 (1986)); see also Gregg v. Georgia,  
 11 428 U.S. 153, 173 (1976) (Eighth Amendment violation when state inflicts  
 12 punishment "so totally without penological justification that it results  
 13 in the gratuitous infliction of suffering"). The core inquiry in  
 14 determining whether prison officials used excessive force in violation  
 15 of the Eighth Amendment is "whether force was applied in a good-faith  
 16 effort to maintain or restore discipline, or maliciously and  
 17 sadistically to cause harm." Hudson, 503 U.S. at 6-7. In determining  
 18 whether an official acted maliciously, a court must ascertain whether he  
 19 or she acted with "deliberate indifference" to an inmate's health or  
 20 safety. Id. at 8. While relevant, the degree of injury suffered by the  
 21 prisoner does not determine a claim's success. Id.

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22  
 23 Reid shut Plaintiff's head in the tray slot of the cell door, not the cell door  
 24 itself). However, when evaluating Defendants' 12(b)(6) motion, the Court may not  
 25 consider these documents. Williston Basin Interstate Pipeline Co. v. An Exclusive Gas  
 26 Storage Leasehold and Easement in the Cloverly Subterranean, Geological Formation, 524  
 27 F.3d 1090, 1096 (9th Cir. 2008) (when adjudicating 12(b)(6) motion, court may "consider  
 28 only allegations contained in the pleadings, exhibits attached to the complaint as  
 true, and matters properly subject to judicial notice"); Schneider, 151 F.3d at 1197  
 n.1. This additional information is not attached to the complaint or contained in any  
 pleading, and no party has requested that the Court take judicial notice of it.  
 Additionally, even if the Court incorporates the additional facts contained in the  
 Franklin Declaration, its recommendations remain the same.

1 Here, the Court must accept as true that while Plaintiff and  
2 Defendant Reid were talking, Defendant Reid suddenly closed the cell  
3 door on Plaintiff's head. Compl. at 3; Iqbal, 129 S.Ct. at 1950 (court  
4 must accept non-conclusory factual allegations as true). And, despite  
5 the screams of Plaintiff and another correctional officer, Defendant  
6 Reid left Plaintiff's head in the cell door until another inmate  
7 released it. Compl. at 3. Under these facts, Plaintiff states a  
8 plausible Eighth Amendment violation.<sup>8</sup>

9 Defendants contend that Plaintiff fails to show Defendant Reid's  
10 actions were not a "good-faith effort to maintain or restore  
11 discipline." Def. Mem. at 8-9. However, Plaintiff is not required to  
12 plead the absence of a situation (such as a prison riot or other threat  
13 of harm) which, if established, would excuse Defendant Reid's violent  
14 action. Rather, Plaintiff is required to plead facts which, if accepted  
15 as true, would plausibly constitute a claim. Twombly, 550 U.S. at 570;  
16 Cholla Ready Mix, 382 F.3d at 973 (court required to view facts in light  
17 most favorable to non-moving party). Additionally, Defendant Reid  
18 closed the door on Plaintiff's head as they "spoke to each other."  
19 Compl. at 3. Although a bare statement, this does not suggest a violent  
20 or potentially violent situation. Further, the fact that Defendant Reid  
21 permitted another prisoner to release Plaintiff's head from the door  
22 strongly indicates the absence of a dangerous situation requiring  
23 Plaintiff's incapacitation. Unlike Iqbal or Moss, the circumstances  
24 here do not suggest a "more likely," non-constitutionally-violative  
25

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26 <sup>8</sup>In making this statement, the Court does not comment on the plausibility of the  
27 scenario described in the Complaint. When adjudicating a motion to dismiss, a court  
28 is required to accept as true even "unrealistic or nonsensical" allegations. Iqbal,  
129 S.Ct. at 1951. At this stage, the question is whether the facts as plead plausibly  
suggest a claim, rather than whether the facts themselves are plausible. Id.

1 explanation. Iqbal, 129 U.S. at 1951-522; Moss, 572 F.3d 971-72.

2 Defendants also argue that Plaintiff fails to show that Defendant  
3 Reid acted with malice. Def. Mem. at 9. However, malice can be imputed  
4 to a defendant when the risk of harm is obvious. Hope v. Pelzer, 536  
5 U.S. 730, 738 (2002) (citation omitted). The chance that an individual  
6 would be harmed when a cell door is closed on his head is obvious, and  
7 if that were not sufficient, Plaintiff "screamed" while trapped in the  
8 door. Compl. at 3. See Iqbal, 129 S.Ct. at 1949 (although plaintiff  
9 must provide more than an "unadorned, the-defendant-unlawfully-harmed-me  
10 accusation," plaintiff is not required to plead "detailed factual  
11 allegations"); see also Buckley v. Gomez, 36 F.Supp. 2d 1216, 1226 (S.D.  
12 Cal. 1997) (denying defendants' motion for summary judgment because  
13 material issue of fact existed as to whether prison guard maliciously  
14 permitted plaintiff's head to remain in closed cell door); Al-Kidd, 2009  
15 WL 2836448, at \* 22 (civil rights plaintiff plead sufficient facts to  
16 withstand motion to dismiss). The Court therefore **RECOMMENDS** that  
17 Defendants' motion to dismiss Plaintiff's Eighth Amendment claim against  
18 Defendant Reid for failure to state a claim be **DENIED**.

19 2. Plaintiff's Eighth Amendment Claim that Defendant Williams Was  
20 Deliberately Indifferent to a Serious Medical Need.

21 Plaintiff argues that Defendant Williams denied him "adequate  
22 medical care" in violation of the Eighth Amendment. Compl. at 3-4.  
23 Specifically, Plaintiff contends that in the aftermath of the door-  
24 closing incident, Defendant Williams conducted a medical inspection of  
25 Plaintiff's head and jaw, and "although [Defendant Williams] felt where  
26 the swelling was on my head and jaw, he only circled the two areas on  
27 the report marked 'pain.' He refused to take the exam any further  
28 therefore his [medical report] was false." Compl. at 4. Plaintiff also

1 contends that Defendant Williams told Plaintiff he "could see no  
2 physical damage." Compl. at 3. Liberally construed, this constitutes  
3 an allegation that Defendant Williams was deliberately indifferent to a  
4 serious medical need. Erickson, 551 U.S. at 94 (court must liberally  
5 construe *pro se* civil rights plaintiff's claims). Defendants argue that  
6 Plaintiff fails to show a sufficiently serious injury or plead enough  
7 facts to constitute an Eighth Amendment violation, and that Plaintiff's  
8 claim therefore must be dismissed under Rule 12(b)(6). Def. Mem. at 9-  
9 11.

10 A public official's "deliberate indifference to a prisoner's  
11 serious illness or injury" violates the Eighth Amendment's proscription  
12 against cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97,  
13 105 (1976). There is both an objective and a subjective component to an  
14 Eighth Amendment violation. See Clement v. Gomez, 298 F.3d 898, 904  
15 (9th Cir. 2002). The objective component generally is satisfied so long  
16 as the prisoner alleges facts to show that his medical need is  
17 sufficiently "serious" such that the "failure to treat [the] condition  
18 could result in further significant injury or the unnecessary and wanton  
19 infliction of pain." Id.; Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th  
20 Cir. 2000) (en banc); see also Doty v. County of Lassen, 37 F.3d 540,  
21 546 n.3 (9th Cir. 1994) ("serious" medical conditions are those a  
22 reasonable doctor would think worthy of comment or treatment, those  
23 which significantly affect the prisoner's daily activities, and those  
24 which are chronic and accompanied by substantial pain).

25 The subjective component requires the prisoner to allege facts  
26 showing a culpable mental state, specifically, "deliberate indifference  
27 to a substantial risk of serious harm." Farmer v. Brennan, 511 U.S.  
28 825, 836 (1994). "Deliberate indifference" is evidenced only when "the

1 official knows of and disregards an excessive risk to inmate health or  
2 safety; the official must both be aware of the facts from which the  
3 inference could be drawn that a substantial risk of serious harm exists,  
4 and he must also draw the inference." Id. at 837.

5 Plaintiff meets neither the objective nor the subjective components  
6 of this test. Regarding the former, Plaintiff does not allege a serious  
7 injury that Defendant Williams failed to treat. Rather, Plaintiff  
8 merely alleges that Defendant Williams failed to note on the medical  
9 report the swelling on Plaintiff's head and jaw. Compl. at 4.  
10 Plaintiff does not allege, or present any facts to support such an  
11 allegation, that the swelling was substantial such that "the failure to  
12 treat [it] could result in further significant injury or the unnecessary  
13 and wanton infliction of pain." Clement, 298 F.3d at 904. Moreover,  
14 Plaintiff admits that Defendant Williams stated that he did not observe  
15 any physical damage. Compl. at 3. While Plaintiff asserts, without  
16 factual support, that Defendant Williams could feel swelling (id. at 4),  
17 the facts, rather than bare assertions, establish that Plaintiff has not  
18 alleged a serious medical condition that a "reasonable doctor would  
19 think worthy of comment." Doty, 37 F.3d at 546 n.3.

20 Plaintiff also fails to allege any facts indicating that Defendant  
21 Williams' conduct caused or exacerbated his injury. Although Plaintiff  
22 states that the door-closing incident caused "irreparable harm, from  
23 constant pain to needing a mood stabilizer especially for anxieties with  
24 authorities" (Compl. at 3), he does not connect this harm to Defendant  
25 Williams. See Moss, 557 F.3d at 971 (to survive Rule 12(b)(6) motion,  
26 complaint must directly connect defendants' actions with alleged harm);  
27 Preschooler II v. Clark County School Bd. of Trustees, 479 F.3d 1175,  
28 1183 (requiring a "causal connection" between official's act and harm

1 suffered). Plaintiff also fails to explain how he would have suffered  
2 less, or received better treatment, had Defendant Williams' medical  
3 report noted "swelling" as well as "pain." Accordingly, Plaintiff's  
4 claim is deficient because it fails to adequately allege an objectively  
5 serious medical need.

6 Plaintiff also fails under the subjective component of the test.  
7 "In order to show deliberate indifference, an inmate must allege  
8 sufficient facts to indicate that prison officials acted with a culpable  
9 state of mind." Wilson v. Seiter, 501 U.S. 294, 302 (1991). The  
10 indifference must be substantial, and inadequate treatment due to  
11 malpractice, or even gross negligence, does not rise to the level of a  
12 constitutional violation. Estelle, 429 U.S. at 106. Plaintiff's claim  
13 is based on allegations that while Defendant Williams examined his head  
14 and jaw, he stated that he did not believe Plaintiff's explanation for  
15 the injury, stated he "could see no physical damage," refused to "take  
16 the exam any further," and then filed a false medical report by failing  
17 to include the swelling on Plaintiff's face. Compl. at 2-4. Assuming  
18 these allegations are true, they still do not constitute the  
19 "unquestioned and serious deprivations of basic human needs," or denials  
20 "of the minimal civilized measure of life's necessities" necessary for  
21 an Eighth Amendment claim. Rhodes, 452 U.S. at 347.

22 First, Plaintiff does not allege what further medical examination  
23 Defendant Williams was required to conduct. Plaintiff's injury was to  
24 his head and jaw, and Defendant Williams inspected those. Compl. at 3  
25 (Defendant Williams "felt where there was swelling on my head & jaw").  
26 Although Plaintiff believes that he required a more thorough  
27 examination, a difference of opinion regarding the preferred course of  
28 medical treatment does not constitute an Eighth Amendment violation.

1 Gillen v. D'Amico, 237 Fed.Appx. 173, 174 (9th Cir. 2007); Sanchez v.  
 2 Vild, 891 F.2d 240, 242 (9th Cir. 1989). Similarly, Defendant Williams'  
 3 decision to omit "swelling" from the medical report may well reflect his  
 4 medical opinion that Plaintiff's swelling was not sufficient to merit  
 5 notation.

6 Second, even when combined with Defendant Williams' statement that  
 7 he thought Plaintiff lied about the source of his injuries (Compl. at  
 8 3), the alleged actions do not plausibly indicate a "wanton" infliction  
 9 of suffering betraying a culpable state of mind. Wilson, 501 U.S. at  
 10 302 (in context of Eighth Amendment "the offending conduct must be  
 11 wanton") (emphasis in original). Rather, the more likely explanation is  
 12 that in performing a limited exam and not indicating "swelling,"  
 13 Defendant Reid followed his judgment as a medical technician. See  
 14 Iqbal, 129 S.Ct. at 1952 (granting motion to dismiss when complaint did  
 15 not contain "any factual allegation sufficient to plausibly suggest"  
 16 government actors' culpable mental state); Moss, 572 F.3d at 971-72  
 17 (same).

18 For the above reasons, this Court **RECOMMENDS** that Plaintiff's  
 19 Eighth Amendment claim against Defendant Williams be **DISMISSED WITHOUT**  
 20 **PREJUDICE**. See Ramirez, 334 F.3d at 861 (court should grant a *pro se*  
 21 plaintiff leave to amend complaint "unless the pleading could not  
 22 possibly be cured by the allegation of other facts").

23 **C. Plaintiff's Fourteenth Amendment Claim.**

24 Plaintiff asserts that Defendants' conduct also violated his  
 25 Fourteenth Amendment rights to "adequate medical care" and "freedom from  
 26 cruel and unusual punishment." Compl. at 3. However, the Fourteenth  
 27 Amendment's substantive due process protections only are implicated when  
 28 the detainee has not been convicted of a crime. Ingraham v. Wright, 430

1 U.S. 651, 671 n.40, 673-74 (1977); Jones v. Blanas, 393 F.3d 918, 931  
 2 (9th Cir. 2004). Because Plaintiff was a convicted prisoner at the time  
 3 of the allegedly unconstitutional actions, his claims arise solely under  
 4 the Eighth Amendment. See Ingraham, 430 U.S. at 671 n.40; see also  
 5 County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) (quoting United  
 6 States v. Lanier, 520 U.S. 259, 272 n.7 (1997)) (finding that  
 7 substantive due process analysis is inappropriate when the claim already  
 8 is "'covered by a specific constitutional provision, such as the Fourth  
 9 or Eighth Amendment ...'").

10 As discussed above, Plaintiff's claims are covered by Eighth  
 11 Amendment's prohibitions against cruel and unusual punishment and denial  
 12 of medical care. This Court therefore **RECOMMENDS** that Plaintiff's  
 13 Fourteenth Amendment claims be **DISMISSED WITH PREJUDICE**.

14 **E. Eleventh Amendment Immunity.**

15 Plaintiff fails to state whether he is suing Defendants in their  
 16 individual or official capacities. Compl. at 2 (check boxes indicating  
 17 whether Defendants sued in official or individual capacities left  
 18 blank). To the extent Plaintiff sues Defendants in their official  
 19 capacities, Defendants correctly argue that they are immune from  
 20 liability for damages under the Eleventh Amendment. Def. Mem. at 2.

21 "The Eleventh Amendment bars actions for damages against state  
 22 officials who are sued in their official capacities in federal court."  
 23 Dittman v. California, 191 F.3d 1020, 1025-26 (9th Cir. 1999); see also  
 24 Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) (a suit  
 25 for damages against a state official in his or her official capacity is  
 26 a really a suit against the state itself, which is prohibited by the  
 27 Eleventh Amendment). The only exception to this rule lies when a  
 28 plaintiff sues official actors for prospective injunctive relief. Flint



1 v. Dennison, 488 F.3d 816, 825 (9th Cir. 2007).

2 Here, Plaintiff requests only monetary damages, not injunctive  
3 relief. Compl. at 7. Therefore, the Court **RECOMMENDS** that Plaintiff's  
4 claims against Defendants in their official capacities be **DISMISSED WITH**  
5 **PREJUDICE**.

6 **F. Qualified Immunity.**

7 Defendants<sup>9</sup> contend that, insofar as Plaintiff sues them in their  
8 individual capacities<sup>10</sup>, they are protected by qualified immunity. Def.  
9 Mem. at 12-14. Specifically, Defendants argue that because Plaintiff  
10 has not articulated a constitutional violation, they are immune from  
11 prosecution. Plaintiff does not address the issue.

12 Qualified immunity shields government officials performing  
13 discretionary functions from liability for civil damages unless their  
14 conduct violates clearly established statutory or constitutional rights  
15 of which a reasonable person would have known. Anderson v. Creighton,  
16 483 U.S. 635, 638-40 (1987). "Qualified immunity is 'an entitlement not  
17 to stand trial or face the other burdens of litigation.'" Saucier v.  
18 Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 472 U.S.  
19 511, 526 (1985)). This privilege is "an *immunity from suit* rather than  
20 a mere defense to liability; and like an absolute immunity, it is  
21 effectively lost if a case is erroneously permitted to go to trial."  
22 Id. at 200-01 (quoting Mitchell, 472 U.S. at 526). Thus, the Supreme

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24 <sup>9</sup>While Defendants' moving papers reference a "Defendant Peterson" and a "First  
25 Amended Complaint" (Def. Mem. at 13), the Court will evaluate the claim to qualified  
26 immunity as if asserted by Defendants Reid and Williams in relation to the claims  
alleged in Plaintiff's complaint.

27 <sup>10</sup>Although Plaintiff does not indicate the capacity in which he sues Defendants,  
the Ninth Circuit repeatedly has held that "a section 1983 suit against state actors  
necessarily implies a suit against the defendants in their personal capacities."  
28 Cerrato v. San Francisco Cmty. Coll. Dist., 26 F.3d 968, 973 n.16 (9th Cir. 1994).

1 Court "repeatedly [has] stressed the importance of resolving immunity  
2 questions at the earliest possible stage in litigation." Id. at 201  
3 (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (*per curiam*)).

4 Assessing qualified immunity is a two-step process. Saucier, 533  
5 U.S. at 201. First, a court must consider whether "[t]aken in the light  
6 most favorable to the party asserting the injury, [] the facts alleged  
7 show the officer's conduct violated a constitutional right." Saucier,  
8 533 U.S. at 201. Second, the allegedly-violated right must be clearly  
9 established such that "it would be clear to a reasonable officer that  
10 his conduct was unlawful in the situation he confronted." Id. at 201-  
11 02. If an officer makes a reasonable mistake as to what the law  
12 requires - i.e. the right is not clearly established - the officer is  
13 entitled to immunity. Id. at 202-03. Courts may "exercise their sound  
14 discretion in deciding which of the two prongs of the qualified immunity  
15 analysis should be addressed first in light of the circumstances in the  
16 particular case at hand." Pearson v. Callahan, --- U.S. ---, 129 S. Ct.  
17 808, 818 (2009).

18 1. Plaintiff's Eighth Amendment Claim Against Defendant Reid.

19 Interpreting the facts in the light most sympathetic to Plaintiff,  
20 Defendant Reid closed a cell door on Plaintiff's head without warning,  
21 and permitted it to remain there for an extended period of time despite  
22 the loud protestations of Plaintiff and another prison guard. Compl. at  
23 3. As discussed above (supra at 16-19), when the facts are construed in  
24 this manner, they allege that Defendant Reid violated Plaintiff's  
25 constitutional right to be free from cruel and unusual punishment.  
26 Hudson, 503 U.S. at 6-7 (violation of Eighth Amendment when prison guard  
27 uses force "maliciously and sadistically to cause harm"). As Defendants  
28 apparently concede since they do not address it, this right is clearly

1 established. See Watts v. McKinney, 394 F.3d 710, 711 (9th Cir. 2005)  
2 (correctional officer should know that banging prisoner's head into wall  
3 violated "clearly established" Eighth Amendment prohibition against  
4 malicious and sadistic use of force); see also Buckley, 36 F.Supp. 2d at  
5 1227 (denying motion for qualified immunity because factual question  
6 existed as to whether defendants' conduct rose to level of  
7 constitutional violation). The Court therefore **RECOMMENDS** that  
8 Defendants' motion to dismiss Plaintiff's claim against Defendant Reid  
9 on qualified immunity grounds be **DENIED WITHOUT PREJUDICE**.

10 2. Plaintiff's Eighth Amendment Claim Against Defendant Williams.

11 As set forth above, the Court has recommended that the Eighth  
12 Amendment claim asserted against Defendant Williams be dismissed without  
13 prejudice for failure to state a claim. See, supra at 19-23. Because  
14 there is no viable claim alleged against Defendant Williams, the Court  
15 is unable to evaluate whether he is entitled to qualified immunity for  
16 the alleged conduct. Unless and until Plaintiff alleges a  
17 constitutional violation, there can be no determination regarding the  
18 applicability of qualified immunity. As stated by the Supreme Court, if  
19 plaintiff fails to plead a constitutional violation, "there is no  
20 necessity for further inquiries concerning qualified immunity."  
21 Saucier, 533 U.S. at 201. Accordingly, the Court **RECOMMENDS** that  
22 Defendants' motion to dismiss Plaintiff's claim against Defendant  
23 Williams on qualified immunity grounds be **DENIED WITHOUT PREJUDICE**.

24 G. Summary of Recommendations.

25 To summarize the foregoing, the Court recommends that:

26 (1) All of Plaintiff's claims be dismissed without prejudice for  
27 failure to exhaust administrative remedies;

28 (2) Defendants' motion to dismiss Plaintiff's claim against

1 Defendant Reid for failure to state a claim be denied without prejudice;

2 (3) Defendants' motion to dismiss Plaintiff's claim against  
3 Defendant Williams for failure to state a claim be granted, and that  
4 claim be dismissed with leave to amend;

5 (4) Plaintiff's Fourteenth Amendment claims be dismissed with  
6 prejudice;

7 (5) Insofar as Plaintiff sues Defendants in their official  
8 capacities, those claims be dismissed with prejudice under the doctrine  
9 of Eleventh Amendment immunity;

10 (6) Defendants' motion to dismiss due to qualified immunity for  
11 Defendant Reid be denied without prejudice, and;

12 (7) Defendants' motion to dismiss due to qualified immunity for  
13 Defendant Williams be denied without prejudice.

14 **CONCLUSION**

15 For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the  
16 District Court issue an Order: (1) approving and adopting this Report  
17 and Recommendation, (2) granting Defendants' Motion to Dismiss.

18 **IT IS HEREBY ORDERED** that any written objections to this Report  
19 must be filed with the Court and served on all parties **no later than**  
20 **October 20, 2009**. The document should be captioned "Objections to  
21 Report and Recommendation."

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1       **IT IS FURTHER ORDERED** that any reply to the objections shall be  
2 filed with the Court and served on all parties **no later than November**  
3 **10, 2009**. The parties are advised that failure to file objections  
4 within the specified time may waive the right to raise those objections  
5 on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455  
6 (9th Cir. 1998).

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8 DATED: September 29, 2009

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BARBARA L. MAJOR  
United States Magistrate Judge